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CHARLES ELMORE

No. 720

In the Supreme Court of the United States

OCTOBER TERM, 1930

WALTER C. FETTERS, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PETITIONER

v.

UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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No. —

WALTER C. FETTERS, UNITED STATES MARSHAL FOR the Eastern District of Pennsylvania, petitioner

v.

UNITED STATES OF AMERICA EX REL. THOMAS W. Cunningham

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of Walter C. Fetters, United States Marshal for the Eastern District of Pennsylvania, prays that a writ of certiorari issue to bring before this Court the cause between the above-entitled parties, which is now pending in the Circuit Court of Appeals for the Third Circuit, but which has not been submitted to, heard, or decided by that court.

QUESTION PRESENTED

Whether an indictment under Section 102 of the Revised Statutes charging the respondent with having, as a witness before a Committee of the Sen-

ate, refused to answer questions pertinent to the question under inquiry by the Committee, was sufficient evidence of probable cause to sustain an order for his removal for trial in proceedings under Section 1014 of the Revised Statutes.

STATEMENT

On April 20, 1928, the respondent was indicted in the Supreme Court of the District of Columbia upon the charge of having refused to answer certain pertinent questions in a hearing being conducted by a Senate Committee. The indictment set forth in detail the Senate resolutions under which the Committee functioned, and also set forth the questions which respondent refused to answer, alleging that they were pertinent to the inquiry being conducted by the Committee. (R. 9–28.) Later in 1928 the respondent was apprehended in Philadelphia under a warrant of arrest issued under Section 1014 of the Revised Statutes (*infra*, p. 8) by the United States District Judge sitting as a committing magistrate. (R. 40.) At the hearing the respondent's identity was admitted. (R. 42–43.) The Government introduced a certified copy of the indictment as evidence of probable cause, and then rested. (R. 43–63.)

The respondent challenged the sufficiency of the indictment, asserting in effect that it failed to show that the questions which the respondent refused to answer were pertinent to the Committee's inquiry, notwithstanding the fact that the indictment al-

leged that they were pertinent. The respondent also introduced a transcript of his testimony before the Senate Committee. (R. 67–87.) The respondent was ordered committed for removal, and the court issued a warrant directing his removal to the District of Columbia. (R. 115.) He then filed a petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania, alleging, in substance, that the indictment failed to show that the questions which he refused to answer "were pertinent questions in the inquiry then being made by the particular Committee of the United States Senate." (R. 93–95.) After a hearing, the petition was ordered dismissed (R. 96), the court holding that the indictment was sufficient to support a warrant of removal. (R. 33; *United States ex rel. Cunningham* v. *Mathues*, 26 F. (2d) 272.)

The relator then appealed to the Circuit Court of Appeals for the Third Circuit. That court, with one judge dissenting, reversed the judgment below on the ground that the indictment failed to charge a crime because the questions which the respondent refused to answer did not appear to be pertinent. *United States ex rel. Cunningham*, v. *Mathues*, 33 F. (2d) 261. On rehearing, the court adhered to its prior decision, in an opinion which has not been reported.[1] Thereupon a petition for

[1] This opinion appears at pp. 51–52 of the record filed in this Court in the case of *Mathues* v. *United States ex rel. Cunningham*, No. 451, October Term, 1930.

a writ of certiorari was filed in this Court on behalf of the United States Marshal. This Court, on October 27, 1930, granted a writ of certiorari and, on suggestion that the cause had abated because the Marshal had gone out of office, and no substitution had been made within the time provided by statute, ordered that the judgments of the Circuit Court of Appeals and of the District Court be vacated and the cause remanded to the District Court with directions to dismiss the proceedings as abated. *Mathues* v. *United States ex rel. Cunningham,* 282 U. S. iii.

On the abatement of the original *habeas corpus* proceedings in the District Court the respondent surrendered himself to the United States Marshal then in office. The respondent thereupon filed a new petition for a writ of *habeas corpus* which contained allegations similar to those made in the former petition. (R. 3–5.) A return to the writ was filed, setting out as an exhibit the record in the former *habeas corpus* proceedings. (R. 32, 37–101.) Although the return was traversed, it was stipulated by counsel that the hearing should be determined upon the petition and the return, including the former *habeas corpus* proceedings, made a part of the return. (R. 103.) After a hearing, the court ordered that the relator be discharged (R. 107), stating in its opinion (R. 104–106) that the law of the case had been determined by the opinion of the Circuit Court of Appeals in the former *habeas corpus* proceedings.

On December 23, 1930, an appeal to the Circuit Court of Appeals for the Third Circuit was allowed (R. 110), and on January 14, 1931, the case was docketed in the Circuit Court of Appeals. No further proceedings in that court have been had.

SPECIFICATION OF ERRORS

The District Court erred:

1. In directing that the respondent be discharged.

2. In holding that the indictment failed to charge an offense.

3. In holding that the indictment was not evidence of probable cause sufficient to sustain the commitment of the respondent for removal under Section 1014 of the Revised Statutes.

REASONS FOR GRANTING THE WRIT

1. The decision of the District Court followed the decision of the Circuit Court of Appeals in *United States ex rel. Cunningham* v. *Mathues,* 33 F. (2d) 261, which proceeding was abated in this Court because of the failure to substitute after the separation of the United States Marshal from his office. 282 U. S. iii. The decision is in apparent conflict with the following applicable decisions of this Court: *Henry* v. *Henkel,* 235 U. S. 219; *Benson* v. *Henkel,* 198 U. S. 1; *Hyde* v. *Shine,* 199 U. S. 62; *Rodman* v. *Pothier,* 264 U. S. 399; *Hughes* v. *Gault,* 271 U. S. 142.

2. Unless overruled by this Court, the decision of the Circuit Court of Appeals, followed by the Dis-

trict Court in this case, will stand as a precedent for the determination before removal of the defendant of issues triable only in the trial district and will thus tend to hinder, delay, and defeat the administration of justice.

Wherefore it is submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

FEBRUARY, 1931.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 104) has not yet been reported. No opinion has been rendered by the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals in *United States ex rel. Cunningham* v. *Mathues* is reported in 33 F. (2d) 261; its opinion on rehearing is not yet reported.[1] The opinion of the District Court in that case is reported in 26 F. (2d) 272.

JURISDICTION

The judgment of the District Court was entered on December 23, 1930. (R. 107.) Appeal to the Circuit Court of Appeals for the Third Circuit was allowed on December 23, 1930. (R. 110.) The case has not been heard or submitted in the Circuit Court of Appeals. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The statute upon which the indictment was founded is Section 102 of the Revised Statutes (U. S. C., Title 2, Sec. 192), which reads as follows:

> Every person who having been summoned as a witness by the authority of either House

[1] See note on p. 3, *supra*.

of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

Section 1014 of the Revised Statutes (U. S. C., Title 18, Sec. 591) provides as follows:

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other

than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The duties of commissioners of circuit courts, referred to in this section, were transferred to United States Commissioners by the Act of May 28, 1896, c. 252, Sec. 19, 29 Stat. 184.

ARGUMENT

The decision of the District Court in the instant case was made in obedience to the precedent established by the Circuit Court of Appeals for the Third Circuit in *United States ex rel. Cunningham* v. *Mathues*, 33 F. (2d) 261, and was based upon the record of the original removal proceedings which was before the Circuit Court of Appeals in the *Mathues case*. An appeal from the decision of the District Court has been taken to the Circuit Court of Appeals, and the Government now files this petition for certiorari "without the formality of awaiting the result" which is predetermined by the former decision of that court. *Lektophone Corporation* v. *Rola Co.*, 282 U. S. 168, 169.

The indictment in the instant case was founded on Section 102 of the Revised Statutes (*supra*, p. 8) which makes it an offense for any person summoned as a witness before a Committee of Congress willfully to refuse "to answer any question

pertinent to the question under inquiry." The indictment sets forth the questions which the respondent refused to answer at a hearing being conducted by a special Senate Committee investigating certain corrupt practices, and then definitely charges that the questions were pertinent to the inquiry being made by the Committee. (R. 9–28.) The Circuit Court of Appeals below determined that the pertinency of the questions was a matter for it to decide in its determination of the question whether the indictment constituted probable cause for the removal, and then held that the questions were not pertinent. In so doing we submit that the court below failed to observe the narrow limits of power which may be exercised either in removal proceedings or on *habeas corpus* to test the validity of an order of removal.

This Court has frequently determined that in removal proceedings or in a *habeas corpus* to test the validity of an order of removal the sufficiency of an indictment which is not palpably invalid is a question to be determined solely by the trial court. *Horner* v. *United States*, 143 U. S. 570, 577; *Benson* v. *Henkel*, 198 U. S. 1; *Hyde* v. *Shine*, 199 U. S. 62; *Henry* v. *Henkel*, 235 U. S. 219; *Rodman* v. *Pothier*, 264 U. S. 399; *Hughes* v. *Gault*, 271 U. S. 142. Under the rule established by these decisions the pertinency of the questions alleged in the indictment in the instant case should have been left for determination by the trial court in the District of Columbia.

The question of pertinency under Section 102 of the Revised Statutes has been likened to the question of materiality of false testimony charged as perjury. *Sinclair* v. *United States,* 279 U. S. 263, 298. Such questions are peculiarly for the consideration and determination of the trial court. In *Henry* v. *Henkel, supra,* the question of pertinency under Section 102 of the Revised Statutes was raised in an attempt to defeat removal, but this Court held that it was a question for the determination of the trial court and could not be determined in the removal proceeding. The other cases cited do not present the precise point here presented, but they disclose the controlling principles which this Court has applied in confining proceedings under Section 1014 of the Revised Statutes (*supra,* pp. 8-9) to the mere consideration of probable cause, excluding from the consideration of the committing magistrate with rare exceptions all questions regarding the sufficiency of the indictment or the jurisdicton of the trial court.

Furthermore, we believe that the pertinency of the questions clearly appears. Respondent introduced in the removal proceedings a transcript of his testimony before the Senate Committee. (R. 67-87.) This testimony was discussed in the opinion of this Court in *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 609, as follows:

> The questions here presented for determination grow out of an inquiry instituted by the United States Senate in respect of the

validity of the election of a United States Senator from Pennsylvania in November, 1926. The inquiry began before the election, immediately after the conclusion of the primaries, by the adoption of a resolution appointing a special committee to investigate expenditures, promises, etc., made to influence the nomination of any person as a candidate or promote the election of any person as a member of the Senate at the general election to be held in November, 1926.

After the Pennsylvania primaries, Cunningham was subpœnaed and appeared before this committee. Among other things, he testified that he was a member of an organization which supported William S. Vare for Senator at the primary election; that he had given to the chairman of the organization $50,000 in two instalments of $25,000 each prior to the holding of the primaries. He had been clerk of a court for 21 years and was then receiving a salary of $8,000 a year. He paid the money to the chairman in cash, but refused to say where he obtained it except that he had not drawn it from a bank. He would not say how long the money had been in his possession; said he had never inherited any, but declined to answer whether he had made money in speculation. In short, he declined to give any information in respect of the sources of the money, insisting that it was his own and the question where he had obtained it was a personal matter. He further said that he had

> learned the trick from a former senator of "saving money and putting it away and keeping it under cover"; that this senator "was a past master in not letting his right hand know what his left hand done, and he dealt absolutely in cash. The 'long green' was the issue."

The questions which were put to Cunningham, and which he declined to answer, were designed to test the accuracy of his story and to discover whether or not the funds he contributed were in fact moneys furnished by other persons. (R. 16–17, 19, 21, 23, 25, 27.) In the *Barry case, supra,* it was not necessary for this Court to determine the pertinency of the questions which the respondent refused to answer; but in commenting on his testimony, this Court said in that case (p. 619):

> Upon examination by the committee, he repeatedly refused to answer questions which the committee deemed relevant and of great importance, not upon the ground that the answers would tend to incriminate him, but that they involved personal matters. These questions have already been recited, and it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election.

The Circuit Court of Appeals, both in *United States ex rel. Cunningham* v. *Mathues,* 33 F. (2d) 261, 263, and in the *Barry case* (29 F. (2d) 817, 821), held that the questions were not pertinent to the question under inquiry by the Committee, and

directed the respondent's discharge from custody in both cases. Apparently the court below failed to appreciate the necessity of testing the accuracy of the respondent's story. He had been clerk of a State court for twenty-one years, and at the time of his examination was receiving a salary of only $8,000 per year, and yet he testified that he contributed $50,000 in cash toward the expenses of a Senatorial campaign. (R. 68–73.) This story called for a most searching examination as to the source of this money, for the purpose of enabling the Committee to determine whether he was telling the truth or was acting for others in making the contribution. Consequently we believe that the court below erred in holding that the questions were not pertinent, if that question was before it for decision.

CONCLUSION

We submit that the decision below was erroneous, and that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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